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of the United States Court of Customs and Patent Appeals and the United States Customs Court

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DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

(T.D. 74–180)

Foreign currencies—Certification of rates

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 18, 1974.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified the following rates of exchange which varied by 5 per centum or more from the quarterly rate published in Treasury Decision 74–124 for the following country. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following daily rates:

Austria schilling:	
June 6, 1974	$0.0559
June 7, 1974	.0559

(LIQ-3-O:D:T)

R. N. MARRA,
Director,
Duty Assessment Division.

[Published in the Federal Register July 3, 1974 (39 FR 24521)]

(T.D. 74-181)

Customs Seal—Customs Regulations amended

Section 1.8(a), Customs Regulations, relating to the Customs seal, amended

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

TITLE 19—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 1—GENERAL PROVISIONS

Pursuant to Treasury Department Order No. 165-23 (38 FR 13037), the Bureau of Customs was as of August 1, 1973, designated the United States Customs Service. This change requires that a corresponding change be made to the Customs seal and to section 1.8(a) of the Customs Regulations, which describes the seal. In addition, other minor changes which have recently been made in the design of the Department of the Treasury seal have also affected the Customs seal and the description of that seal set forth in the regulations.

To reflect these changes, section 1.8(a) of the Customs Regulations is amended to read as follows:

§ 1.8 Customs seal.

(a) The Customs seal of the United States, consisting of the seal of the Department of the Treasury surrounded by an outer circle in which appears the words "Treasury" at the top and "U.S. Customs Service" at the bottom according to the design furnished by the Department of the Treasury, shall be impressed upon all official documents requiring the impress of a seal, provided that the Customs seal currently in official use, including the dies, rolls, plates, and like devices now in the possession of the Bureau of Engraving and Printing, shall continue to be equally effective as the official seal of the United States Customs Service, and shall continue to be so used by each Customs officer and employee having possession of the device of the seal, until that particular device needs to be replaced and is replaced.

* * * * * * *

(R.S. 251, as amended, sec. 624, 46 Stat. 759; 19 U.S.C. 66, 1624)

Because this amendment merely conforms the Customs Regulations with a Treasury Department Order and requires no public initiative, notice and public procedure thereon is found to be unnecessary, and good cause exists for dispensing with a delayed effective date under the provisions of 5 U.S.C. 553.

Effective date. This amendment shall be effective upon publication in the Federal Register.

(ADM-9-03)

VERNON D. ACREE,
Commissioner of Customs.

Approved June 26, 1974:

DAVID R. MACDONALD,
Assistant Secretary of the Treasury.

[Published in the Federal Register July 5, 1974 (39 FR 24630)]

(T.D. 74-182)

Foreign currencies—Certification of rates

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 10, 1974.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified the following rates of exchange which varied by 5 per centum or more from the quarterly rate published in Treasury Decision 74-124 for the following country. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following daily rates:

Austria schilling:
June 10, 1974 ---------- $0.0557

(LIQ-3-O:D:T)

R. N. MARRA,
Director,
Duty Assessment Division.

[Published in the Federal Register July 5, 1974 (39 FR 24675)]

(T.D. 74-183)

Foreign currencies—Daily rates for countries not on quarterly list

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, Philippine peso, Singapore dollar, Thailand baht (tical)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 26, 1974.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates in U.S. dollars for the dates and foreign currencies

shown below. These rates of exchange are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR, Part 159, Subpart C).

Hong Kong dollar:

For the period June 10 through June 14, 1974, rate of $0.1980.

Iran rial:

For the period June 10 through June 14, 1974, rate of $0.0149.

Philippines peso:

For the period June 10 through June 14, 1974, rate of $0.1495.

Singapore dollar:

June 10, 1974	$0.4125
June 11, 1974	.4100
June 12, 1974	.4100
June 13, 1974	.4080
June 14, 1974	.4085

Thailand baht (tical):

For the period June 10 through June 14, 1974, rate of $0.0495.

(LIQ-3-O:D:T)

R. N. MARRA,
Director,
Duty Assessment Division.

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. 1127)

THE UNITED STATES *v.* J. M. ALTIERI, A/C ANTONIO ROIG SUCESORES
S. EN C. No. 5514 (— F.2D —)

1. CLASSIFICATION–COPPER TUBES–PARTS OF SUGAR MACHINERY–TSUS

Customs Court's judgment sustaining protest that certain copper tubes, classified under TSUS item 613.02 as seamless copper tubes were properly classified under TSUS item 666.20 as parts of machinery for use in the manufacture of sugar (duty free), reversed.

2. ID.–"USE TEST"

"Machinery" for use in the manufacture of sugar, of which importations are "parts," under TSUS 666.20, must meet "use test" also.

3. ID.–CHIEF USE

The Customs Court correctly concluded that machinery for use in the manufacture of sugar in item 666.20 is a classification by chief use.

United States Court of Customs and Patent Appeals, June 27, 1974

Appeal from United States Customs Court, C.D. 4355

[Reversed.]

Irving Jaffe, Acting Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *Wesley K. Caine*, attorneys of record, for the United States.

Siegel, Mandell & Davidson, Joshua Davidson, Brian S. Goldstein, attorneys of record, for appellee.

[Oral argument on April 1, 1974, by Mr. Caine for appellant and by Mr. Goldstein for appellee]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE and MILLER, *Associate Judges*.

Part 2.—Metals, Their Alloys, and Their Basic Shapes and Forms

Part 2 headnotes:

1. This part covers precious metals and base metals * * *, their alloys, and their so-called basic shapes and forms, and, in addition, covers metal waste and scrap. * * * This part does not include—

* * * * * * *

(iv) other articles specially provided for elsewhere in the tariff schedules, or parts of articles.

* * * * * * *

Subpart C.—Copper

Subpart C headnotes:

1. This subpart covers copper, its alloys, and their so-called basic shapes and forms, and in addition covers copper waste and scrap.

* * * * * * *

Pipes and tubes and blanks therefor, pipe and tube fittings, all the foregoing of copper:

Pipes and tubes and blanks therefor:

Copper, other than alloys of copper:

Item		
613.02	Seamless ----------	5.2¢ per lb.

Claim Sustained by Court Below:

Schedule 6, TSUS—Metals and Metal Products

* * * * * * *

Part 4.—Machinery and Mechanical Equipment

Part 4 headnotes:

1. This part does not cover—

* * * * * * *

(v) articles and parts of articles specifically provided for elsewhere in the schedules.

* * * * * * *

RICH, Judge.

This appeal is from the decision and [1] judgment of the United States Customs Court, Third Division, 68 Cust. Ct. 169, C.D. 4355 (1972), sustaining appellee's protest against the classification of cer-

tain copper tubes imported from Mexico to San Juan, Puerto Rico, under TSUS 613.02 as seamless copper tubes. The Customs Court held the merchandise classifiable under TSUS 666.20 as parts of machinery for use in the manufacture of sugar. We reverse.

The statutes involved are:

10. General Interpretative Rules. For the purposes of these schedules—

* * * * * * *

(e) in the absence of special language or context which otherwise requires—

(i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined;

(ii) a tariff classification controlled by the actual use to which an imported article is put in the United States is satisfied only if such use is intended at the time of importation, the article is so used, and proof thereof is furnished within 3 years after the date the article is entered;

* * * * * * *

(ij) a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

Classified under:

Schedule 6, TSUS—Metals and Metal Products

* * * * * * *

Subpart C.—Agricultural and Horticultural Machinery; Machinery for Preparing Food and Drink

* * * * * * *

	Industrial machinery for preparing and manufacturing food or drink, and parts thereof:	
Item 666.20	Machinery for use in the manufacture of sugar, and parts thereof--------	Free

The merchandise consists of approximately 8100 seamless copper tubes, six feet, 6½ inches long, 16 gauge, 1¾ inch outside diameter,

with their ends annealed. The importer-appellee, Antonio Roig Sucesores, ordered the tubes for use in new evaporators it had purchased but which it had received in incomplete condition, without the tubes. The evaporators were to replace old ones used in its sugar manufacturing plant. Each evaporator consisted of an enclosed vessel with a heat exchanger in the bottom. The heat exchangers were made up of copper tubes fixed between plates so that steam could flow around the tubes while juice extracted from the sugar cane flowed through them to be heated. The ends of the tubes were annealed to soften the copper so that the ends could be flanged in assembling the tubes with the plates.

The Customs Court ordered the parties to file supplemental briefs directed to the following question:

> Is the TSUS item 666.20 classification for "Machinery for use in the manufacture of sugar, and parts thereof" a classification controlled by rule of "chief use" or controlled by rule of "actual use" under [General Interpretative Rule] 10(e) *supra*?

On that matter the court concluded:

> The legislative history, cited *supra* [Tariff Classification Study, Submitting Report, Part II, pages 5, 14, Appendix A, page 50, November 15, 1960], and in the supplemental briefs, discussing the problems attending tariff classifications by "chief use" and "actual use", in our opinion, is too indefinite and uncertain to resolve that TSUS item 666.20 is an "actual use" provision as plaintiff contends. Since TSUS item 666.20 is in the same classifying language as paragraph 1604 of the Tariff Act of 1930, from which TSUS item 666.20 is derived, we are constrained to follow the established judicial construction that as classified in paragraph 1604, *United States* v. *Union Sugar Div., Consolidated Foods Corp.*, 54 CCPA 1, C.A.D. 892 (1966), and TSUS item 666.20, *S. Jackson & Son, McCandless, Inc.* v. *United States*, 65 Cust. Ct. 327, C.D. 4097 (1970), "machinery for use in the manufacture of sugar" is a classification by "chief use."

The court then held that "the imported tubes which were designed and dedicated for sole use with machinery used in the manufacture of sugar are parts of said machinery and sustain[ed] the protest." It rejected appellant's contention that there was no evidence that the imported tubes were in a class of tubes which were solely or chiefly used in heat exchangers of evaporators chiefly used in the manufacture of sugar. The court justified its position that proof that the evaporators were of a class or kind chiefly used in the manufacture of sugar was unnecessary by stating:

> * * * the rule of chief use, when and if applicable, is a rule for classifying imported articles, and the imported articles in this case are tubes not evaporators.

It then stated that "it is fair to infer" upon the record that appellee's "evaporator is an integral component of its aggregate machinery, used in the manufacture of sugar.

Opinion

The imported merchandise here is the seamless copper tubes and the classification in issue under TSUS [2] 666.20 is that of the Customs Court as "parts" of "machinery for use in the manufacture of sugar," rather than as the "machinery" itself. General Interpretative Rule 10(ij), supra, providing that a "solely" or "chiefly used" test is applicable in determining the status of "parts" is applicable to the tubes. However, the Customs Court apparently overlooked the fact that appellee must also prove that the "machinery" of which the tubes are parts is "machinery *for use in the manufacture of sugar*" (emphasis added). Thus, the evaporators with their heat exchangers containing the tubes are also subject to a use test.

As to the kind of use test applicable, we are satisfied that the [3] court correctly concluded that "machinery for use in the manufacture of sugar in item 666.20 is a classification by 'chief use'." The court aptly characterized the legislative history advanced before it as "too indefinite and uncertain" to demonstrate that the "established judicial construction" supporting its conclusion was not to be followed in this case. Appellee here argues again that TSUS 666.20 is controlled by actual use, relying largely on a part of the legislative history considered by the lower court and certain other arguments pointing out that "machinery for the manufacture of sugar" was separated out from various other agricultural implements included with it in paragraph 1604 of the 1930 Act in adopting the present Tariff Schedules. Nothing persuasive of appellee's position is seen in the arguments advanced. Rather, it is significant that appellee has not cited any decisions to support the attack on the "established judicial construction" of "machinery for use in the manufacture of sugar" as a chief use provision.

Appellee's burden of proving the classification claimed in his protest thus requires demonstration that the elements of "chief use" of the "machines" or evaporators have been met. See General Interpretative Rule 10(e)(i), supra; also, *L. Tobert Co.* v. *United States*, 41 CCPA 161, C.A.D. 544 (1953) (use in the United States rather than mere local use) and *United States* v. *The Baltimore & Ohio R.R. Co.*, 47 CCPA 1, C.A.D. 719 (1959) (use of the class or type of goods rather than a particular shipment). On this point, the court itself referred to "the record testimony that the evaporators with heat exchangers are also used in power plants and in distilleries, and that some distilleries use copper tubes in heat exchangers." In contrast to that testimony adverse to its position, appellee has offered no significant evi-

dence that the evaporators using heat exchangers with the tube therein were of a "class or kind" whose "use in the United States" for the manufacture of sugar "exceeds all other uses (if any) combined." Rule 10(e)(i). Appellee thus has failed to provide satisfactory evidence of compliance with the use test for the "machinery" part of TSUS 666.20. Likewise we find the evidence insufficient to comply with the sole or chief use test applicable under Rule 10(ij) for "parts" of such machinery. The most pertinent evidence is testimony of appellee's witness Arsuaga that "in Puerto Rico" the type of tube imported "is exclusively used in sugar mills." There is no evidence regarding use on *a national basis* of seamless tubes of the class or kind imported.

Appellee also relies on *The Servco Co.* v. *United States*, 68 Cust. Ct. 83, C.D. 4341 (1972), affirmed, *United States* v. *The Servco Co.*, 60 CCPA 137, C.A.D. 1098, 477 F.2d 579 (1973). That case dealt with Schedule 6, Part 2, Headnote 1(iv), which states that Part 2, which includes TSUS 613.02 in which the District Director classified the present tubes, does not include

> * * * other articles specially provided for elsewhere in the tariff schedules, *or parts* of articles. [Emphasis added.]

Since appellee is adjudged not to have met his burden of proving that the tubes are properly classified in TSUS 666.20, as claimed, the *Servco* case is not reached in determining that the judgment below must be reversed. However, appellee's aforementioned failure of proof also results in a failure to show that the importations are provided for elsewhere than in TSUS 613.02, as originally classified. It would not suffice for appellee to prove the tubes do not belong in TSUS 613.02. That is only half of his dual burden.

Accordingly, the judgment of the Customs Court is *reversed.*

(C.A.D. 1128)

GENERAL INSTRUMENT CORPORATION v. THE UNITED STATES No. 5541
(— F.2d —)

1. CLASSIFICATION–T.V. DEFLECTION YOKES

Customs Court decision overruling protest concerning denial of an allowance under item 807.00 TSUS for certain products of the United States constituting parts of black and white television deflection yokes. Reversed.

2. AMERICAN GOODS RETURNED AFTER EXPORTATION

In *General Instrument Corporation* v. *United States*, 60 CCPA 178, C.A.D. 1106, 480 F.2d 1402 (1973), the rationale of *Amplifone Corp.* v. *United States*, 65 Cust. Ct. 58, C.D. 4054 (1970), was specifically rejected.

3. ID.–NOT "FURTHER FABRICATION"

Despooling, cementing, winding, and taping are not "further fabrication" steps, but rather assembly steps within the meaning of item 807.00.

United States Court of Customs and Patent Appeals, June 27, 1974

Appeal from United States Customs Court, C.D. 4421

[Reversed.]

Eugene L. Stewart, attorney of record, for appellant.
Irving Jaffe, Acting Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *James Caffentzis*, for the United States.

[Argued on April 4, 1974, by Mr. Stewart for appellant and by Mr. Caffentzis for the United States]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE and MILLER, *Associate Judges*.

BALDWIN, Judge.

[1] This appeal is from the decision and judgment of the United States Customs Court, 70 Cust. Ct. —, C.D. 4421, 359 F.Supp. 1390 (1973), overruling the importer's protest against the denial of an allowance under item 807.00 TSUS for certain products of the United States constituting parts of black and white television deflection yokes imported from Taiwan. The yokes were classified under the provision for parts of television apparatus in item 685.20 TSUS and that classification is not disputed. We reverse.

The involved importations span a time period when two versions of item 807.00 were in effect. Item 807.00, as it was originally enacted in 1963, reads:

Articles assembled abroad in whole or in part of products of the United States which were exported for such purpose and which have not been advanced in value or improved in condition abroad by any means other than by the act of assembly----------	A duty upon the full value of the imported article, less the cost or value of such products of the United States. . . .

Item 807.00, as amended by Public Laws 89–241 and 89–806, in effect in 1967 reads:

Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting ----------	A duty upon the full value of the imported article, less the cost or value of such products of the United States. . . .

The merchandise in issue is magnet wire and lead wire, both of which were on spools when exported from the United States to Taiwan. The magnet wire is used for making the horizontal or vertical coils in the imported yokes. The lead wire is used for making the lead wire harness contained in the deflection yokes.

The Customs Court briefly described the initial steps taken in Taiwan with the magnet and lead wire after its exportation from the United States in the following manner.

> In the first stage of operations abroad wire which is used to make horizontal coils . . . is *despooled* from the supply spool and *formed* into the primary shape of a horizontal coil by a winding machine. The coil is then removed from the winding machine and *taped* to prevent unraveling of its adjacent turns which at this point adhere to each other by means of the bonding material on its outer surface. After separation from the supply spool, the coil is *cement dipped*, *dried*, and precision *shaped* by machine pressing to fit the contours of a plastic liner on which it is subsequently mounted.
>
> Next, ferrite cores are inserted into the winding machine for the making of vertical coils. The machine is then actuated and wire . . . is *despooled* from the supply spool and vertically *wound* around the ferrite cores for a prescribed number of turns. The coils are then separated from the supply spool, removed from the machine, and *taped* to prevent unraveling of the turns.
>
> In this manner two horizontal coils and two vertical coils are prepared for each yoke with the magnet wire.

> Then, an appropriate number of "lead wires" . . . are *drawn from supply spools* and mechanically *cut* to desired lengths. The ends of the lead wires are mechanically *stripped* of insulating material for electrical connection purposes. The lead wires are then brought together with a plug assembly, *woven* into a cable harness, and *secured with tape.*
>
> At this point we have a finished cable harness ready for cementing to a terminal panel. (Emphasis added.)

The coils and harnesses produced are described as "second level sub-assemblies."

The Customs Court held that since "both versions of item 807.00 contemplate the exportation from the United States of 'components' of the imported article, as distinguished from mere 'products' . . . ., the fundamental question . . . is whether the subject wire was a component of the yoke when exported from the United States."

The court found that since the wire products were sub-assembled when first used abroad, they could not be directly employed as components in the assembly of the imported yokes, without further fabrication. Therefore, the court found the holding of *Amplifone Corporation* v. *United States*, 65 Cust. Ct. 58, C.D. 4054 (1970) to be dispositive of the importer's claim and dismissed the importer's protest.

Opinion

In the interim period since the Customs Court's decision, this court decided the case of [2] *General Instrument Corporation* v. *United States*, 60 CCPA 178, C.A.D. 1106, 480 F.2d 1402 (1973), familiarity with which is presumed, wherein we specifically rejected the rationale of the *Amplifone* case. Appellee, while acknowledging this court's decision in *General Instrument*, asserts that the facts of the present case are distinguishable therefrom and that the rationale of *E. Dillingham, Inc.* v. *United States*, 60 CCPA 39, C.A.D. 1078, 470 F.2d 629 (1972) should be applicable to the facts of the instant case.

Citing *Dillingham*, appellee contends that the involved wire was subject to "further fabrication," thus precluding item 807.00 treatment for the imported wire. In *Dillingham*, the importer sought item 807.00 treatment for certain fiber and fabric of which imported papermakers' felts from Canada were composed. The fiber and fabric were products of American origin and the fiber had been sent to Canada in bulk, baled form. Item 807.00 treatment for the fiber was denied because the fiber component, *before being assembled with the fabric*, was subjected to further fabrication comprising the steps of "opening, oiling and carding." It is these operations that appellee asserts are of the same degree as the despooling, cementing, winding, taping, etc., steps performed upon the wire in the instant case, which steps

appellee asserts should also be held to constitute further fabrication of the wire components.

We cannot agree with that assertion. [3] The steps performed upon the wire after its exportation to Taiwan are not "further fabrication" steps, but rather assembly steps within the meaning of item 807.00. We can perceive no substantial differences between the instant assembly steps and those of *General Instrument* which were held not to constitute "further fabrication." Furthermore, unlike the fiber component in *Dillingham*, the instant wire, exported to Taiwan on spools, was capable of immediately entering into the assembly process to make the imported yokes.

As to the other requirements imposed by item 807.00, it should suffice to repeat what we said in *General Instrument*.

> We find that all the articles in issue here meet those requirements. Concededly all are products of the United States and all went into the imported [deflection yokes]. The meaning of "fabricated" is broad and without doubt applies to the [spools of wire] which obviously were manufactured articles. The articles did not lose their physical identity in the [yoke] "by change in form, shape or otherwise." As stated in *United States* v. *Baylis Brothers Co.*, 59 CCPA 9, 451 F. 2d 643, 646, C.A.D. 1026 (1971):
>
> > The legislative history makes it equally apparent, however, that Congress did not intend to exclude articles from item 807.00 merely because the American components had undergone some change of form or shape. The test specified in item 807.00 is whether the components have been changed in form, shape or otherwise to such an extent that they have lost their *physical identity* in the assembled article. The term "physical identity" was used to exclude from item 807.00 those assembled articles whose American components are "chemical products, food ingredients, liquids, gases, powders," and the like. [Footnote omitted].
>
> Since the only changes in the exported articles were "by being assembled" or "by operations incidental to the assembly," the items have not been "advanced in value" . . . .

The decision and judgment of the Customs Court is *reversed*.

(C.A.D. 1129)

THE UNITED STATES *v.* C. J. TOWER & SONS OF BUFFALO, INC.
No. 5512 (—F.2d —)

1. CLASSIFICATION–TRANSPORTATION OF EQUIPMENT–MISTAKE OF FACT

Customs Court decision granting importer's cross-motion for summary judgment in suit based on 19 USC 1520(c)(1) asking reliquidation for mistake of fact to classify aircraft fuel cells under TSUS

item 832.00, providing for free entry as emergency war material, affirmed.

2. CUSTOMS COURT–JURISDICTION–19 USC 1520(c)(1)

Customs Court had jurisdiction of a protest under 19 USC 1520 (c)(1) against refusal to reliquidate to correct a mistake of fact, namely, importer's lack of knowledge that importations were emergency war material, filed within 60 days of refusal to reliquidate, notwithstanding no protest was filed under 19 USC 1514 to classification within 60 days of initial liquidation.

3. ID.–28 USC 1583

Customs Court's jurisdiction derives from 28 USC 1583 (now superseded by 28 USC 1982) rather than from 19 USC 1514, which provides broadly for protests from decisions of collectors.

4. ID.–TIMELY FILING OF PROTEST UNDER 19 USC 1520(c)(1); 19 USC 1514

Customs Court, on timely filed protest under 19 USC 1520(c)(1) does not lack jurisdiction because 19 USC 1514 does not specifically refer to mistake of fact or inadvertence but only to "a clerical error."

5. ID.–MISTAKE OF FACT

Lack of knowledge that imports were emergency war material was "mistake of fact" and not "error in the construction of a law" under 19 USC 1520(c)(1).

United States Court of Customs and Patent Appeals, June 27, 1974

Appeal from United States Customs Court, Protest No. 70/1827

[Affirmed.]

Irving Jaffe, Acting Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *John A. Gussow*, attorneys of record, for the United States.

Barnes, Richardson & Colburn, attorneys of record, for appellee. *Rufus E. Jarman, Jr.*, of counsel.

[Oral argument on April 2, 1974, by Mr. Gussow for the United States and by Mr. Jarman for appellee]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE, and MILLER, *Associate Judges*.

RICH, Judge.

This appeal is from the decision and judgment of the United States Customs Court in *C. J. Tower & Sons of Buffalo, Inc.* v. *United States*, 68 Cust. 17, C.D. 4327, 336 F. Supp. 1395 (1972). We affirm.

This case involves aircraft fuel cells imported from Canada. Appellee, acting as customshouse broker for the LTV Vought Aeronautics Division of Ling-Temco-Vought, Inc., entered the fuel cells under item 694.60, TSUS, at a duty of 9% ad valorem. There were four separate entries which were liquidated between May 31 and

July 27, 1966, and, no protests having been filed, they became final sixty days later pursuant to section 514 of the Tariff Act of 1930, as amended (19 USC 1514), such final liquidation dates being August 1, October 3, September 12, and September 26, 1966. Section 514 reads:

> Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation.

November 14, 1966, appellee wrote a letter to the Bureau of Customs, which was received the following day, making a request under section 520(c)(1) of the Tariff Act, as amended (19 USC 1520), for reliquidation under item 832.00, TSUS, providing for free entry. The basis of the request was that appellee had not been aware of the fact that the fuel cells constituted emergency defense purchases pursuant to Government contract, which could be imported duty free under item 832.00, and that there had been a mistake of fact or inadvertence within the meaning of section 520(c)(1). This statute and TSUS item 832.00, under which appellee's claim was made, read as follows:

Section 520. Refunds and errors

> (c) Notwithstanding a valid protest was not filed, the Secretary of the Treasury may authorize a collector to reliquidate an entry to correct—

(1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, appraisement, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the customs service within one year after the date of entry, appraisement, or transaction, or within sixty days after liquidation or exaction when the liquidation or exaction is made more than ten months after the date of the entry, appraisement, or transaction; * * *.

Tariff Schedules of the United States

Schedule 8. Special Classification Provisions

Schedule 8 headnote:

1. The provisions of this schedule are not subject to the rule of relative specificity in headnote 10(c) of the General Headnotes and Rules of Interpretation, and, except as provided in headnote 3 to part 1 of this schedule, any article which is described in any provision in this schedule is classifiable in said provision if the conditions and requirements thereof and of any applicable regulations are met.

* * * * * * *

Part 3, Subpart A:

* * * * * * *

Item 832.00	Articles for military departments: Materials *certified to the Commissioner* of Customs by the authorized procuring agencies to be emergency war material purchased abroad	Free

[Emphasis supplied.]

In January of 1968, more than one year after the liquidations in question, appellee supplied the necessary certification, required by item 832.00 and pertinent customs regulations, that the fuel cells were emergency war material.

April 10, 1968, Bureau of Customs at Buffalo, N.Y., denied appellee's request because the certificates required by item 832.00 had not been received within one year of the dates of liquidation so that the importer had not made his case complete within the statutory period of section 520(c)(1). On May 17, 1968, appellee requested reconsideration and on May 22, 1968, filed a protest. June 6, 1968, Bureau of Customs at Washington, D.C., refused reconsideration. Thereafter the action was brought in the Customs Court to review these rulings.

[1] In the Customs Court, after issue was joined, the Government filed a motion for summary judgment on August 5, 1971, supported by a fourteen-paragraph "Statement of Material Facts." September 13, 1971, appellee filed a motion for summary judgment supported by its "Statement of Material Facts" which included the identical fourteen paragraphs of the Government's statement plus three more with an affidavit of Peter Tower, an employee of appellee. The Government then responded to the three new paragraphs, which it admitted in part, and in that manner agreed facts were laid before the court. There has been no trial. This appeal is from the court's decision on the cross-motions.

The Customs Court granted appellee's motion and denied the Government's motion. There was a motion by the Government for a rehearing supported by a lengthy brief, making the same arguments made before us, which the Customs Court denied without opinion.

Decision of the Customs Court

Recognizing in its opinion on the motions for summary judgment that the Government challenged is jurisdiction for lack of the filing of a timely protest following the initial liquidation, the Customs Court nevertheless assumed jurisdiction and decided the motions. On motion for rehearing, the court's jurisdiction was again challenged on still other grounds and, as above stated, the court denied that motion. The court found: that a timely protest had been filed under section 514 to the denial of the request to reliquidate made under section 520(c)(1); that failure to claim duty-free entry under item 832.00 was due to a mistake of fact or inadvertence which did not amount to an error in the construction of a law; that the mistake or inadvertence was brought to the attention of the Customs Service within one year of the date of entry; and that the failure to provide the necessary documentary evidence within one year of the dates of liquidation did not bar the claim under section 520 or any relevant regulation.

Appellant's Points

The Government presents three questions, all of which it would have us answer in the negative:

1. Whether the Customs Court had jurisdiction of a protest against the refusal to reliquidate to correct anything other than a "clerical error" in the liquidation.
2. Whether the Customs Court erred, as a matter of law, in holding that the subject claim falls within the ambit of section 520(c)(1).
3. Whether the Customs Court erred in finding that "mistake of fact or other inadvertence" had been established and in holding, with respect thereto, that no triable issue of fact exists.

Opinion

1. Jurisdiction

[2] We hold that the Customs Court had jurisdiction. It entertained appellee's protest, timely filed within sixty days of a customs decision, which was properly subject to protest under section 514. The decision was a refusal to reliquidate made on April 10, 1968. Protest was filed May 22, 1968.

We reject the involved reasoning by which appellant attempts to persuade us—and by which it failed to persuade the Customs Court—that while that court admittedly had jurisdiction to review a refusal to reliquidate an entry *for a clerical error* under section 520(c)(1), it did not have such jurisdiction with respect to a refusal to reliquidate for "mistake of fact, or other inadvertence," set forth in the very next words of that section. In fact, we feel that the proposition verges on the preposterous. It is based on a too myopic and too purely verbal construction of the language of section 514.

[3] Section 514 is not a jurisdiction-granting statute. Jurisdiction of the Customs Court, as appellant himself contends, was derived from 28 USC 1583 (now superseded by 28 USC 1582, effective by virtue of the Customs Courts Act of June 2, 1970, P.L. 91–271, 84 Stat. 274). The title of section 514 is "PROTEST AGAINST COLLECTOR'S DECISIONS." It deals with two matters: (1) the *finality* of "all decisions of the collector * * * as to the rate and amount of duties," of "all exactions of whatever character," and of his decisions on other named matters; and (2) the filing of *protests* "in respect to each entry, payment, claim, decision, or refusal." The effect of a timely protest is to *relieve* the decision of its finality and to lay a basis for the review procedure, first by the collector, then by the Customs Court, and thereafter by this court, if a party chooses to continue, all as set forth in the next succeeding section, 515.

Appellant makes much of the fact that no protest was ever filed against the decision liquidating the entries under item 694.60, wherefore they became final. This is of no moment. As we said in *United States* v. *Miles*, 57 CCPA 1, 5, C.A.D. 967 (1969), by approval of language used in the Customs Court opinion,

> Liquidations, final and conclusive under section 514, do not bar protestable section 514 rights asserted under other provisions of law. 19 U.S.C., section 1520 [520]. Nor do we conceive it beyond the power of Congress to create a protestable right on matters settled in liquidation.

In *Miles* we did not find that appellant's right arose under section 520, though recognizing that rights might arise thereunder, but under

a retroactive act of Congress, P.L. 89–468, providing for free entry of copper scrap. The case involved a refusal of the collector to reliquidate on the ground that the request was untimely because the liquidation had become final. In view of appellant's contention here that a protest which brings a decision before the Customs Court for review must be found somewhere in the *specific* recitations of section 514 (such as "refusal to reliquidate any entry for a clerical error"), we call attention to the fact that there was no provision for refusal to reliquidate because of enactment of a retroactive statute, any more than there is for refusal to liquidate because of a "mistake of fact, or other inadvertence." We held in *Miles*, nevertheless,

> Under the facts of record, the importer's request for reliquidation was timely and the protest from the refusal of the request was in compliance with section 514.

We think the broad language of section 514, "all decisions of the collector * * * as to the rate and amount of duties chargeable" and the provision for filing a protest to a "decision, or refusal," suffices to encompass the situation here, as it did in *Miles*, notwithstanding lack of specific reference to it. Similarly, the jurisdiction-granting statute, 28 USC 1583 (now 1582, which contains even more inclusive language) gives the Customs Court review jurisdiction corresponding to the broad language we have quoted from section 514. See the eloquent discussion of a similar problem involving section 514, and section 520 in an earlier version, in *Hudson Fwdg. & Shipping Co.* v. *United States*, T.D. 46389, 63 Treas. Dec. 819 (1933).

[4] Appellant's argument for lack of jurisdiction appears to rest on the premise that a refusal to reliquidate because of a mistake of fact, as provided in section 520, is not within the ambit of section 514 because, unlike a "clerical error," "mistake of fact" is not mentioned in section 514. If mistake of fact is outside 514 for one purpose it must be outside for all purposes. That would mean that a decision not to reliquidate for a mistake of fact would never become final and conclusive. We are sure appellant would not argue that to be the case. In fact, appellant tacitly admits such a refusal *is* within section 514, though not mentioned therein, to the extent of permitting *administrative* review, but not for the purpose of permitting *judicial* review of administrative action. The argument falls by its own weight.

2. Mistake of Fact

[5] Appellant here attempts to show that appellee's claim is not within the scope of section 520(c)(1) and that the Customs Court was wrong because this claim does not involve a question of fact but an "error in the construction of a law," which is the exclusionary

language of the section. At least that is what we understand the argument to be. In the end, the argument comes back to claiming that what appellee should have done was to file a timely protest to the original liquidation. We see no merit in the arguments made. There was a mistake of fact in that appellee did not know that the fuel cells were emergency war material under a Government contract, the fact being that they were. There was, therefore, no reason to protest. There is no allegation of any error in the construction of a law by anyone. It is a simple matter of being allowed to present the evidence to show that the fuel cells were all along entitled to free entry, although knowledge of that fact was acquired after liquidation of the entires had taken place. The facts were mistaken at the time.

3. No Issue of Material Fact

Appellant finally argues that proof must be adduced that the importer was unaware of the facts justifying duty-free entry because the record is silent in this respect. On the contrary, appellee's Statement of Material Facts includes the following:

> 15. The merchandise covered by the protest herein consists of materials certified to the Commissioner of Customs by the authorized procuring agencies to be emergency war material purchased abroad.
>
> * * * * * * *
>
> 17. At no time prior to sixty days after liquidation of the merchandise covered by the protest herein did the District Director of Customs at Buffalo, New York know the fact set out in number 15 above, nor did plaintiff.

The Government response was (emphasis ours):

> 15. Admitted except that defendants [sic] notes that said certification was furnished to the Commissioner after the dates of final liquidation of these entries set forth in paragraph 9 of the statement of material facts.
>
> * * * * * * *
>
> 17. Admitted. It is obvious that the importation was not certified to the Commissioner of Customs prior to final liquidation, no steps having been taken by plaintiff to secure such certification.

The added comments about when the certification reached the Commissioner of Customs in no way qualify the admission that the importer was unaware of the facts justifying duty-free entry and we are unable to see anything that needs to be proved to justify the summary judgment granted to appellee.

Conclusion

Appellant not having convinced us of any error by the Customs Court, its judgment is *affirmed.*

(C.A.D. 1130)

MADDEN MACHINE COMPANY, INC. *v.* THE UNITED STATES
No. 74–14 (—F.2d—)

1. JURISDICTION–19 USC 1520(c)(1) AND 19 USC 1514

   Order of Customs Court dismissing action, based on denial of protest under 19 USC 1514 against denial of request for reliquidation under 19 USC 1520(c)(1), for lack of jurisdiction, reversed.

2. ID.–19 USC 1514

   Exclusion of certain refusals of District Director to reliquidate from status of protestable decisions under 19 USC 1514 would mean that such decisions would never become final, and such an absurd result is not to be attributed to Congress.

3. ID.–TIMELINESS–19 USC 1520(c)(1)

   District Director's refusal to reliquidate under 19 USC 1520(c)(1) was a protestable "decision" for purposes of 19 USC 1514, notwithstanding that said refusal was not within the specific provision covering refusal to reliquidate for a clerical error discovered within specified time limitations.

United States Court of Customs and Patent Appeals, June 27, 1974

Appeal from United States Customs Court, Court No. 71–10–01467

[Reversed.]

Dean Holbrook (Boyd & Holbrook), attorneys of record, for appellant.

Irving Jaffe, Acting Assistant Attorney General, *Andrew P. Vance*, Chief Customs Section, *Max F. Schutzman*, for the United States.

[Argued on April 1, 1974, by Mr. Holbrook for appellant and by Mr. Schutzman for the United States]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE and MILLER, *Associate Judges.*

[1] This appeal is from an order of the Customs Court (motion for rehearing denied), dismissing appellant's action for lack of jurisdiction.[1] We reverse and remand.

[1] Appellant also seeks to appeal from the order denying its motion for rehearing and from an order denying its motion for leave to file a supplemental memorandum. No claim of error or abuse of discretion is cited by appellant in its Statement of Errors with respect to these orders. Accordingly, our review will be limited to the order of dismissal.

Appellant's action is based on denial of its protest against the denial of its request for reliquidation under section 520(c)(1) of the Tariff Act of 1930 (19 USC 1520(c)(1)), as amended, with respect to the entry in 1966 of a paper making machine and/or parts therefor imported from Finland. The entry was appraised, and notice thereof sent to appellant on January 19, 1970. Liquidation was effected on March 27, 1970. The parties are in disagreement over the date reliquidation was requested, with appellee apparently claiming November 20, 1970, and appellant alleging several dates, the first being May 28, 1970 ("at a meeting with the District Director at Houston") and all "within one year after the appraisement on January 19, 1970." On January 22, 1971, the request for reliquidation was denied. The protest was filed on March 22, 1971, and was denied by operation of law on August 5, 1971.[2] The summons commencing this action was filed on October 22, 1971.

Jurisdiction of the Customs Court is provided by 28 USC 1582, as amended June 2, 1970, by Public Law 91-271 (84 Stat. 274).[3] The part thereof which is pertinent to this appeal reads as follows:

> (c) The Customs Court shall not have jurisdiction of an action unless . . . a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended . . . .

Section 514 of the Tariff Act of 1930 (19 USC 1514)[4] provides:

> . . . all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character . . ., and his liquidation or reliquidation of any entry, . . . or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation . . . when such liquidation . . . is made more than ten months after the date of entry, shall, upon

[2] On July 6, 1971, appellant filed a request for accelerated disposition of its protest. No action having been taken on the protest within thirty days, it was deemed denied under the provisions of 19 USC 1515, as amended.

[3] With certain exceptions not applicable to appellant's action, the amendment of June 2, 1970, to 28 USC 1582 was made effective October 1, 1970, by section 122 of P.L. 91-271.

[4] This does not include the amendment by P.L. 91-271, section 203 of which made such amendment effective with respect to articles entered prior to October 1, 1970, *only* where the appraisement of such articles had not become final before October 1, 1970, and for which an appeal for reappraisement had not been timely filed before October 1, 1970, or with respect to which a protest had not been disallowed before October 1, 1970. Appellant did not file an appeal for reappraisement, and the appraisement became final before October 1, 1970, under 19 USC 1501. The words "as amended" in 28 USC 1582(c) appear to be merely pro forma; however, they would be technically satisfied by abolition of the Office of Collector of Customs by Reorganization Plan No. 1, effective May 25, 1965 (30 F.R. 7035, 79 Stat. 1317), which was implemented pursuant to the Reorganization Act of 1949 (P.L. 109, 63 Stat. 203).

> the expiration of sixty days after the date of such liquidation, . . . decision, or refusal, be final and conclusive upon all persons . . . unless the importer, consignee, or agent of the person paying such charge or exaction . . . shall, within sixty days after, but not before such liquidation, . . . decision, or refusal, . . . file a protest in writing with the collector . . . .

In its order denying rehearing, we note the Customs Court stated that appellant's administrative protest under section 520(c)(1) against the denial of its request for reliquidation pursuant to section 514 "should have been made within sixty days, i.e., by May 26, 1970," but was not made until May 28, 1970—two days too late to enable the court to take jurisdiction. This statement is confusing inasmuch as the protest was filed March 22, 1971, under section 514 against denial on January 22, 1971, of appellant's request under section 520(c)(1) for reliquidation. What was made by appellant on May 28, 1970 (earliest alleged date) was a request for reliquidation.[5]

Appellant maintains that it filed a timely request for reliquidation under section 520(c)(1), the same having been filed within one year after the date of appraisement; that the District Director's refusal to reliquidate was a protestable "decision" under section 514; and that it filed a timely protest against the District Director's refusal to reliquidate.

Section 520(c)(1), as amended,[6] provides:

> (c) Notwithstanding a valid protest was not filed, the Secretary of the Treasury may authorize a collector to reliquidate an entry to correct—
>
> > (1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, appraisement, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the customs service within one year after the date of entry, appraisement, or transaction, or within sixty days after liquidation or exaction when the liquidation or exaction is made more than ten months after the date of the entry, appraisement, or transaction . . . .

Appellee's position is that under 28 USC 1582(c) jurisdiction of the Customs Court could only be effected by the filing of a *proper* protest

[5] This is apparently what the Customs Court had in mind, and such a request would have been two days too late for purposes of "refusal to reliquidate any entry for a clerical error discovered . . . within sixty days after liquidation" under section 514. We interpret "discovered" to mean "brought to the attention of the customs service," as provided in section 520(c)(1), or "discovered by the customs service." Any other interpretation would be administratively unfeasible.

[6] See footnote 4, supra.

under section 514; that appellant's protest against denial of its request for reliquidation was not a proper protest because such denial was not a protestable decision within the ambit of section 514. It emphasizes the following language (contained in our earlier quotation) from section 514 (emphasis supplied):

> . . . the collector['s] . . . refusal to reliquidate any entry *for a clerical error discovered* within one year after the date of entry, or *within sixty days after liquidation* . . . when such liquidation . . . is made more than ten months after the date of entry . . . .

Appellee points out that appellant's request for reliquidation was not filed until May 28, 1970 (at the earliest), and thus "discovery" of the clerical error was not within sixty days after the liquidation on March 27, 1970. It contends that the intention of Congress in specifically providing in section 514 for protest against a collector's [District Director's] refusal to reliquidate must have been to exclude from protest refusals to reliquidate *not* covered by the specific provision; that the interpretation advanced by appellant would render superfluous the specific language covering clerical error discovered in connection with a collector's [District Director's] refusal to reliquidate.

Without more there would be merit to this contention. But see *Gray* v. *Powell*, 314 U.S. 402, 416 (1941). However, there is more. First, there is the all-encompassing wording of section 514 with respect to "decisions," namely:

> . . . all decisions of the collector . . . shall, upon the expiration of sixty days after the date of such . . . decision . . . be final and conclusive . . . unless the importer, [etc.] . . . shall, within sixty days after . . . such . . . decision . . . file a protest in writing with the collector . . . .

[2] Second, the legislative intent, contended for by appellee, to exclude refusals to reliquidate from protest if they did not come within the specific provision, would mean that such decisions would never become final—an absurd result which is not to be attributed to the Congress. See *United States* v. *Ryan*, 284 U.S. 167, 175 (1931). Finally, it is to be noted that the 1970 amendment to section 514 lists among protestable decisions "the refusal to reliquidate an entry under section 520(c) . . ." and that both the House and Senate committee reports commented: "The revised presentation of categories is without substantive effect." [7]

[3] Accordingly, we hold that the District Director's refusal on January 22, 1971, to reliquidate under section 520(c)(1) was a pro-

[7] S. Rep. No. 91-576, 91st Cong., 1st Sess. 26 (1969); H.R. Rep. No. 91-1067, 91st Cong., 2d Sess. 26 (1970). See also *United States* v. *Miles*, 57 CCPA 1, 5, C.A.D. 967, 416 F.2d 973 (1969).

testable decision for purposes of section 514 and that the Customs Court has jurisdiction of this action.[8]

In view of the foregoing, the order of the Customs Court dismissing appellant's action for lack of jurisdiction is *reversed*, and the case is *remanded* for further proceedings not inconsistent herewith.

(C.A.D. 1131)

MONTGOMERY WARD & Co., INC. *v.* THE UNITED STATES No. 74–7
(—F.2d—)

1. CLASSIFICATION OF IMPORTS–ORGAN ASSEMBLIES–TSUS

   Customs Court's decision dismissing an action challenging classification of certain components of an electronic organ as an electronic musical instrument, "Other," under TSUS 725.47 and claiming classification under TSUS 726.80 as "Musical instrument parts not specially provided for" is reversed.

2. ID.–ITEM 726.80 TSUS

   Four portions of an electronic organ imported together and comprising: a bass foot pedal assembly; a keyboard chassis assembly; an amplifier and expansion pedal assembly; and a reverberation unit held classifiable as "Musical instrument parts not specially provided for" under TSUS 726.80.

3. ID.–ITEM 725.47 TSUS

   Importation of certain components of an electronic organ not classifiable as an electronic musical instrument, "Other," under TSUS 725.47, since the importation, not including a speaker, is incapable of producing sound, and, not including a coordinated cabinet, is incapable of being normally played by musician trained as an organist.

4. APPEALS TO COURT–EXCEPTIONS PRESERVING RIGHT OF REVIEW

   Court of Customs and Patent Appeals takes liberal view of requirement in 28 USC 2601(b) that notice of appeal to the court contain assignments of error, holding certain broad assignments of error sufficient to preserve for review all issues raised below.

United States Court of Customs and Patent Appeals, June 27, 1974

Appeal from United States Customs Court, C.D. 4430, Court No. 71–9–01144

[Reversed.]

Ralph A. Mantynband, attorney of record, for appellant. *Arvey, Hodes & Mantynband*, of counsel.

[8] We express no opinion on the timeliness of appellant's request for reliquidation under section 520(c)(1) inasmuch as this goes to the merits of the District Director's refusal to reliquidate.

Irving Jaffe, Acting Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *Edward S. Rudofsky* for the United States.

[Argued on April 3, 1974, by Mr. Mantynband for appellant and by Mr. Rudofsky for the United States]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE and MILLER, *Associate Judges*.

RICH, Judge.

[1] This appeal is from the decision and judgment of the United States Customs Court, 70 Cust. Ct. 193, C.D. 4430, 362 F. Supp. 560 (1973), which dismissed an action challenging the classification of certain portions of an electronic organ as an electronic musical instrument, "Other," under TSUS 725.47 and claiming classification under TSUS 726.80 as "Musical instrument parts not specially provided for." We reverse.

[2] The four articles imported were: (1) a bass foot pedal assembly; (2) a keyboard chassis assembly; (3) an amplifier and expansion pedal assembly; and (4) a reverberation unit. These components, or subassemblies, were imported together. They are sometimes hereinafter referred to as Exhibits 1, 2, 3, and 4.

The competing provisions of the Tariff Schedules are:

General Interpretative Rule 10(h):

> [U]nless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished[.]

Schedule 7, Part 3, Subpart A

> Subpart A headnotes:
>
> 2. For the purposes of this subpart—
>
> * * * * * * *
>
> (c) the term "*electronic musical instruments*" embraces all musical instruments in which the sound is generated electrically, and conventional-type instruments not suitable for playing without electrical amplification, but the term does not include conventional-type instruments, fitted with electrical pick-up and amplifying devices, when the instrument is suitable for playing without such amplification.
>
> 3. The provisions of this subpart for string, wind and percussion musical instruments include such instruments

	whether or not fitted with electrical pick-up and amplifying devices. Such devices, however, are separately classifiable from the musical instrument with which imported unless such devices are, or are designed and intended to be, fitted into or housed in the instrument itself.	
* * * * * * *		
	Electronic musical instruments	
* * * * * * *		
725.47	Other	17% ad val.

Schedule 7, Part 3, Subpart B.

Subpart B headnote:

1. This subpart does not cover electrical pick-up or amplifying devices or other articles which are provided for in part 5 of schedule 6 or part 2 of schedule 7.

* * * * * * *		
726.80	Musical instrument parts not specially provided for	11.5% ad val.

The imported components, when assembled with other parts furnished in this country, became the Montgomery Ward & Co. electronic organ, Model 8931. Montgomery Ward imported the components, sold them to a company named Wellcor, Wellcor manuactured complete organs therewith, and sold them to Montgomery Ward, which sells them to the public.

The Customs Court opined that if the imported articles had been imported separately, or if less than *all* four of them had been imported together, the importations would "very likely" have been classifiable under Item 726.80 as parts of an electronic musical instrument. It deemed the question to be whether the unassembled imported components "were sufficiently complete to constitute, in their entirety, an article in the class of 'electronic musical instruments'."

The Customs Court found, and it is not disputed, that Wellcor assembled the imported components into a cabinet or case of American manufacture, with a loudspeaker (transducer) of American manufacture, using miscellaneous hardware of American manufacture. The evidence shows that the value of the imported parts was 47.10% of the production cost of the organ and that the parts manufactured in the United States plus various other cost items including a profit were 52.90% of the cost. Notwithstanding the lower court's finding that cost items other than the cost of the imported components "represent more than 50 percent of what it costs to produce the electronic

organ model No. 8931 for sale at retail," and a further finding that "when assembled, the imported articles are unable to generate an audible musical sound without a loudspeaker," it held the imported components to constitute an electronic musical instrument under item 725.47.

OPINION

This being a classification case we are not limited to review of questions of law and can consider whether the lower court's findings of fact conform to the weight of the evidence. Appellee urges that there is "substantial evidence" to support the Customs Court's findings and, indeed, there is. But we also find there is even more substantial evidence to support appellant's contentions on critical questions of fact. We do not agree with appellee's suggestion that we are bound to accept the Customs Court's findings of fact *whenever* there is substantial supporting evidence, and we will not do so when they are clearly contrary to the weight of the evidence.

The first consideration in this case is whether the importation falls into the category of "Electronic musical instruments," which item 725.47 specifies. Headnote 2(c), above, defines this term as embracing "all musical instruments in which the sound is generated electrically." It is not disputed here that the importation ends up in an "electronic organ," Model 8931. Neither is it disputed that in that organ sound is generated electrically. It is also undisputed that two major parts of the Model 8931 organ as marketed are not among the imports, namely, the cabinet and the loudspeaker. The issue, therefore, reduces to a question of whether the importations, consisting of four major electromechanical organ subassemblies, constitute a *musical instrument* in an *unassembled* condition, namely, an organ. It is to that question that we now turn.

The Government's case for the affirmative is built entirely on a courtroom demonstration put on by its two witnesses and their testimony. One of the witnesses, John Ogle, with three or four years of experience as an organ repairman, took three of the four imported subassemblies or components, omitting the reverberation unit, and made the intended electrical connections between them. He then testified that, if "plugged in and played," "electronic vibrations" would be present but that they would not be audible unless a loudspeaker was added to the assembly. Government counsel then had Ogle connect a loudspeaker and plug in the assembly. The Government then called its second witness, Dennis Halasz, a freshman music student at the University of Illinois, who said he had played electronic organs like the Model 8931, which was also in the courtroom, and he improvised "Blues in G minor" on the hooked-up plugged-in assembly of the imported parts with added

speaker. It has been said that "music hath charms," and this demonstration appears to have had a siren-song effect at the trial stage.

After Mr. Ogle testified that the components of an electronic organ are tone generators, keying systems, voicing systems, amplifying systems, and a *speaker*, he testified further on direct examination, in effect, that an electronic organ without a speaker is still an electronic organ. This, of course, is the ultimate *legal* question in this case, and the testimony was that of a repairman with no knowledge of customs law. On cross-examination Mr. Ogle testified as follows:

> By Mr. Mantynband:
> Q. Without this speaker, Exhibit No. 5, can the four parts over there make music as an electronic musical instrument (indicating)? A. You won't hear any sound.
> Q. Can they make music? A. You won't hear it.
> Q. They can't make music, can they? A. Not if you are considering hearing.
> Q. Is there any other form of music other than hearing? A. That's up to you; I don't know.
> Q. Do you know of any other form besides hearing? A. No.
> Q. That's the only form of music there is, that which you can hear? A. Yes.
> Q. Music you can't hear isn't music, is it? A. You can't hear it.
> Q. Well, it's not music, is it? A. I suppose not.

Along similar lines, Mr. Ogle testified that with the four imported subassemblies you have an electronic organ, even without the cabinet because "You've got all the basic elements for an electronic organ *on the table*." (Emphasis added.) On cross-examination, Mr. Ogle testified:

> Q. Now, you testified that you were able to exercise a judgment as to whether Exhibits 1, 2, 3, and 4 were or were not an organ as they stand on the court's exhibit table. A. Yes.
> Q. Do you recall that testimony? A. Yes.
> Q. Will you tell us what you have had to do, in your entire life, with the manufacturing of an organ? A. None.
> Q. I cannot hear you. A. I said, "None."

Appellant's witness Wilkerson, Montgomery Ward's musical instrument buyer, a professional musician without formal electronics education, testified, inter alia, that he could not sell the imported components "as an organ," that one of the most important influences on the musical qualities of an organ is the cabinet and speaker design, that the speaker used in Model 8931 is of American manufacture, that the speaker is the only part of the organ that generates sound (which seems more than a little obvious), that the imported components, as imported, are not a musical instrument, that before the importation can be functional as an organ "There would have to be additional parts and wiring and

a cabinet and a speaker," and that without the cabinet and the speaker "there is no sound; there is no organ."

Appellant's witness Gene Morez was the director of engineering at Electronic Sound Corporation which built Model 8931 organs until that operation was transferred to a related company of some kind, which is Wellcor. He had been a senior product engineer at two other organ companies, Lowry and Thomas. He testified, inter alia, that the four imported subassemblies could not, "of course," function as an organ without further manufacturing. His direct testimony is concise and highly significant on the issue before us. We reproduce it:

> Q. Now, as Plaintiff's Exhibits 1, 2, 3, and 4 arrive in the United States, are they, in your opinion, able to function as an organ without further manufacturing? A. No. Of course not.
>
> Q. Further manufacturing is required? A. The cabinet is an intrinsical part of an organ. The whole tonality of an organ is based on the cabinet and speaker system selected for it. The frequency range of any given instrument, and the organ is [as] an instrument, is dependent on a character of sound that you want out of it.
>
> This particular organ has low frequency in the pedal tones of 32 cycles per second. It requires an awful lot of power, in the area of 25 watts rms to reproduce that low a frequency in an audible level. And if the speaker was not mounted in the cabinet, the cone would literally just pump a small volume of air. The cabinet, however, coupled to the baffle element of the cabinet, will now make this sound audible. So that cabinet, which holds the tray, which holds the pedal clavier, which incidentally is made to a musician's standard, called the American Guild of Organists—A.G.O. specs'—is required to hold the various components and parts that are put into that cabinet in such a fashion that a person that is experienced in any such fashion with playing an organ can sit down at this unit and feel comfortable at it as the instrument it is.
>
> There are certain locations for that pedal clavier in relationship to the keyboard. There are also certain relationships of that volume control to the keyboard. And if those relationships are not held from one organ to another organ to another organ, there wouldn't be any similarity to the term "organ"—it would be an instrument of its own. So the cabinet in any one of these type of devices is very, very important to its tonal features.

This testimony was not shaken on cross-examination, from which we extract the following:

> By Mr. Henry [Government counsel]:
>
> Q. Now, I would like to go to the veneer cabinet which plaintiff refers to, and just ask you one more thing.
>
> Is the veneer cabinet used for tonal quality purposes, too? A. Yes, it is.
>
> Q. Could you elaborate on that? A. The quality of the wood that makes the cabinet up has a typical reasonance [sic] or

resonant quality which adds a warmth of sound to it, that given a plastic cabinet or something else may not have, but the fact is that it's also a baffle for the speaker. It is the baffle for the speaker compartment that makes the speaker work more efficiently. Any speaker, any given speaker, just held in the air, will produce a sound, but the sound will be limited in range and quality; no low frequency would come out of it because it isn't doing any work. It must be applied to or installed in a baffle—hence, the cabinet, to reproduce these low frequencies—and an organ, by nature, of its own name, must produce low frequencies.

Q. Then the veneer cabinet is used mainly for the purpose of the speakers. A. But, as I pointed out before, it also holds these other components in a specified area.

After review of the entire testimony and with the aid of the evhibits, [3] we are clearly of the opinion that the imported subassemblies, when assembled as was done in the courtroom, do not constitute an electronic organ in the common meaning of that term and therefore do not constitute a musical instrument. They cannot, therefore, be classified under item 725.47. One reason is that two parts of major importance must be added to create an electronic organ, namely, a coordinated cabinet and loudspeaker. Another reason is that to have a musical instrument known as an organ, which can be played upon in conventional fashion by a musician trained as an organist, three of the four imported components which are manipulated by the organist, namely, the keyboard, the bass foot pedal, and the foot-operated swell pedal, must be properly located by means of their mounting in and attachment to the cabinet so as to be in the positions where an organist, by his training, expects to find them. As we understand the courtroom demonstration, in which the witness was able to produce music from three coupled components, they were simply laid on the table or possibly on both the table and the floor, in which arrangement they were far from being what anyone would call an organ in the usual sense. The testimony of knowledgeable experts, moreover, contradicts Mr. Ogle's statement that *all* the basic components of an organ were imported. It is clear to us that the cabinet and speaker are basic elements of an organ.

We have carefully considered the reasoning which led the lower court to find that the cabinet is not an essential component of an electronic organ but are constrained to disagree with it. Familiarity with the court's opinion will be presumed. We do not consider it significant that dictionaries, in defining organs in general, fail to mention cabinets. The cases cited do not seem in point. We find no significant evidence in the record that organs of the type in which the importations are used are ever sold without cabinets. It does not follow from the fact that the current-generating electrical parts characterize

the organ as "electronic" that the cabinet is not essential; nor does it follow from the fact that the cabinet per se does not "advance the imported articles to the condition of an *electronic* organ." (Emphasis ours.)

With respect to the lower court's reasoning that the loudspeaker is not essential to the existence of an electronic organ, we find fundamental error in the lower court's premise that the speaker does not contribute "to the manner in which the sound is generated * * *." We find this same flaw in appellee's argument. The assumption is that the imported electronic components generate "sound" and that the speaker merely makes it audible. The imported components do not generate sound, as the evidence shows and as is well known; they generate electrical currents only. The speaker, which can also be characterized as an electrical device, since it is actuated by the electrical currents fed to it, acts as a transducer to convert electrical energy into sound. Until this occurs, there is no sound. We therefore have to disagree with the lower court's conclusion that the courtroom demonstration "effecitvely dramatized" how the imported components, when assembled, "generated sound electrically." They generated nothing more than electrical currents and there was no sound but for the added loudspeaker, which was not among the imported articles. We deem it essential to its classification as a "musical instrument"—in the absence of some indication of legislative intent to the contrary—that there be a capability in an organ of producing sound when played upon.

We therefore conclude that the imports were not properly classified under item 725.47. The record establishes beyond question that they are, however, "parts" of electronic musical instruments, and no question has been raised as to such parts being properly classified under item 726.80.

The Assignment of Error Question

[4] Appellee has raised a question about the adequacy of the assignment of errors in the notice of appeal to this court to "preserve for review the issue of whether an unfinished electronic musical instrument must be capable of producing audible sound * * * in order to be classified as an electronic musical instrument for tariff purposes." It will be recognized that said issue goes to the very essence of this appeal. The assignments of error read as follows:

2. Concise Statement Of Errors Complained Of:

(a) The judgment is contrary to the evidence;
(b) The judgment is contrary to the law;
(c) The judgment is contrary to the manifest weight of the evidence;

(d) The Court erred in permitting the Court's government witnesses Ogle and Helasz to testify as to opinion evidence;

(e) The Court erred in receiving over plaintiff's objection evidence introduced by the defendant concerning the opinions of the defendant's witnesses that the imported articles constituted an electronic organ.

Appellee cites *United States* v. *Fisher Scientific Co.*, 40 CCPA 164, C.A.D. 513 (1953), in support of the proposition that the errors should be more specifically stated on penalty of any error not so stated not being considered. In *Fisher* the court declined to consider certain vaguely broad assignments of error not only because they were broad but also because "of the almost complete absence of any reference to alleged errors with respect to this importation in the brief and oral argument of appellant." At the same time, the court prefaced its discussion of the point by saying it "is not disposed to be technical upon this subject."

That was over twenty years ago and there has been a change in attitude in this court on the subject of assignments of error, particularly on the patent side of our jurisdiction where the corresponding provision is for "reasons of appeal" and the question has been more frequently raised. For cases involving liberal construction of the reasons of appeal provision see, *In re Howell, Jr.*, 49 CCPA 922, 298 F.2d 949, 132 USPQ 449 (1962); and *In re Arnold*, 50 CCPA 1166, 315 F.2d 951, 137 USPQ 330 (1963). See also the dissenting opinions in *In re Gruschwitz*, 50 CCPA 1498, 320 F.2d 401, 138 USPQ 451 (1963). We point out that appellee has been at no disadvantage in this case by reason of the breadth of the assignments of error since appellant's arguments were made below and were fully made known to it in appellant's brief in this court. We also note the fact that, under the Federal Rules of Appellate Procedure, Rule 3, in other Federal Courts of Appeal *no* assignment of errors is required, nor has one been required ever since adoption of the Federal Rules of Civil Procedure. The statute, 28 U.S.C. 2601(b), now somewhat anachronistic, still requires assignments of error and, consequently, this court's Rule 3.1(b) does likewise. But, even as we said in 1953, we are not disposed to be technical about them since they really serve no useful purpose. We hold the errors assigned in this case sufficient to preserve all issues argued for review. The errors stated go to the whole decision of the Customs Court.

Conclusion

The decision and judgment of the Customs Court is *reversed*.

MILLER, Judge, concurring.

The following statement in the majority opinion (with which I concur) should be amplified: "We find no significant evidence in the

record that organs of the type in which the importations are used are ever sold without cabinets." The inference is that the decision would have been different if such evidence had been present. However, in *Authentic Furniture Products, Inc.* v. *United States*, 61 CCPA —, 486 F.2d 1062, C.A.D. 1109 (1973), there was ample evidence that the importations involved were advertised and sold without "essential" parts, but the majority, nevertheless, held that the importations constituted less than the completed article because the missing parts were "essential." Judge Rich and I dissented, finding that the missing parts were not "essential" in the *commercial* sense, as distinguished from the *functional* sense; also that the missing parts were not "substantial" for purposes of the test of "substantial *and* essential" laid down in *Twin Pin Co. of U.S.A., Inc.* v. *United States*, 24 Cust. Ct. 430, Abstract No. 54254 (1950). Here the cabinets and loud speakers were essential in both the commercial and functional sense; also they were both substantial *and* essential.

Decisions of the United States Customs Court

Customs Decision

(C.D. 4549)

NORMAN G. JENSEN AND THE YOUNG ENGINEERS, INC. } *v.* UNITED STATES

Hardware
(*Studs and panel nuts*)

COMPONENT MATERIAL OF CHIEF VALUE—STEEL AND CADMIUM—INSUFFICIENCY OF EVIDENCE

Merchandise described as "Studs" and "Panel Nuts", imported at Los Angeles, Calif. from Japan, were classified in liquidation under TSUS item 646.42 as base metal fasteners or holders (except nuts)

used with screws, bolts, or studs, and claimed by the importers to be dutiable under TSUS item 646.56 as nuts of iron or steel.

The sales manager for one of the importers testified that he had observed the manufacturing and plating operations in Japan, that the only components of the disputed articles consist of steel and a cadmium plating, that the plating weighs only one-hundredth of one percent of the weight of the fastener and exists in the form of a film of approximately one ten-thousandths of an inch, and that although he was familiar with prices paid by his firm for the plated fasteners during the period of exportation involved he was not familiar with the cost of plating the fasteners in Japan. He stated that the only way the chemical components of the merchandise could be determined accurately would be with an analysis; that he had certificates of analysis in his files but not in court.

Held, the evidence fails to establish the component material of chief value in accordance with settled rules and judicial precedents. The court is not at liberty to speculate under the shelter of the *de minimis* rule in view of the limitations imposed in General Headnotes and Rules of Interpretation, TSUS, No. 9, paragraph (f).

Court No. 69/36576 and Court Nos. 69/20013, etc.

Port of Los Angeles

[Dismissed.]

(Decided June 20, 1974)

Stein & Shostak (*James F. O'Hara* of counsel) for the plaintiffs.

Carla A. Hills, Assistant Attorney General (*Patrick D. Gill* and *Andrew P. Vance* trial attorneys), for the defendant.

RICHARDSON, Judge: The merchandise in these cases which were tried jointly is described on the invoices as "Studs" [69/36576] and as "Self-Locking Pannel Nut" [69/20013]. The merchandise was exported from Japan between March 1968 and October 1969 and classified in liquidation upon entry at the port of Los Angeles, California under TSUS item 646.42 as base metal fasteners or holders (except nuts) used with screws, bolts, or studs, at the duty rate of 15 or 17 *per centum ad valorem*, depending upon the date of entry. It is claimed by the plaintiffs-importers that the merchandise should be classified under TSUS item 646.56 as nuts, at the duty rate of 0.2 cent per pound.

The competing tariff provisions read:

[classified]		
646.42	Cotters, cotter pins, and fasteners or holders (except nuts) used with screws, bolts, or studs, all the foregoing of base metal ----------	17% or 15% ad val.

[claimed]	' Bolts, nuts, studs and studding, screws, and washers (including bolts and their nuts imported in the same shipment, and assembled bolts or screws and washers, with or without nuts); screw eyes, screw hooks and screw rings; turnbuckles; all the foregoing not described in the foregoing provisions of this subpart, of base metal: Of iron or steel:	
*	* * * * * * *	
646.56	Nuts	0.2¢ per lb.

The record before the court consists of the testimony of three witnesses and documentary and sample exhibits in the instant case, and the testimony of two witnesses and documentary and sample exhibits in *The Young Engineers, Inc.* v. *United States*, 67 Cust. Ct. 190, C.D. 4272 (1971), the record in which case is incorporated into the instant case.

In C.D. 4272 the merchandise, described as "self-locking pannel [sic] nuts", was classified under TSUS item 646.42 as fasteners and claimed by the plaintiff to be properly classifiable under item 646.56 as nuts of iron or steel. The evidence in the case established that the merchandise was fabricated from carbon steel and finished with a cadmium plating. However, as there was no evidence in the case bearing on the value of the component materials the majority of the court was of the opinion that the court could not determine that steel was the component material of chief value as contended for by the plaintiff, and, accordingly, overruled the protest.

The instant case purports to be a retrial of the issue in C.D. 4272 at least to the extent of merchandise described as panel nuts. Additionally, evidence has been presented in the instant case concerning merchandise described as studs which is shown on the invoice in Court No. 69/36576. In this regard there is testimony to the effect that the studs are actually nuts and not studs (of a variety other than panel nuts) because they are threaded internally, are made to Boeing Aircraft Company's design specifications, and find use in fastening seats to the C-track on the floor of the aircraft. And the primary question before the court with respect to the "studs" as well as with respect to the "panel nuts" is whether these articles are in chief value of iron or steel so as to require further consideration by the court of plaintiffs' claim for classification of the articles under item 646.56.

On the component material of chief value issue the testimony in the instant record of Stanley R. Jones, sales manager for The Young Engineers, Inc., is pertinent.

Mr. Jones, who previously testified in C.D. 4272, testified herein that he was familiar with the merchandise at bar as a result of having observed its manufacture in Japan on one occasion and having observed the plating operation on numerous occasions, that the only components of the subject merchandise are a low carbon steel and a cadmium plating, that he did not know the relative weights of these components in the articles except that in no case does the weight of the cadmium exceed one-hundredth of one percent of the weight of the nut (R. 13), that the cadmium is present in a very thin film, approximately one ten-thousandths of an inch thick (R. 22). He stated that the only way the chemical components of the merchandise can be determined accurately would be with an analysis, and purchasers normally get a certificate of analysis; that he had certificates on the merchandise in his files, but not in court (R. 37–38). Although he is familiar with the prices which his firm paid the Japanese suppliers during the years 1968 and 1969 for the imported cadmium plated panel nuts he is not familiar with the cost of plating the nuts in Japan nor the price of the other component in the nuts, steel (R. 30).

The foregoing comprises the substance of the evidence bearing on the issue of component material of chief value. Plaintiffs contend that the evidence establishes that the cadmium film which coats the steel nuts at issue is so *de minimis*, so inconsequential, that it could not represent the component material of chief value, citing *Broadway-Hale Stores, Inc.* v. *United States*, 63 Cust. Ct. 194, C.D. 3896 (1969); *Morris Friedman & Co.* v. *United States*, 56 Cust. Ct. 21, C.D. 2607 (1965); and *John S. Connor, Inc.* v. *United States*, 54 Cust. Ct. 213, C.D. 2536 (1965). And defendant contends that the testimony of the witness Jones is not *prima facie* evidence of the component material in chief value, citing *Rudolph Miles* v. *United States*, 64 Cust. Ct. 151, C.D. 3974 (1970), and *Orazio J. Freni, etc.* v. *United States*, 60 Cust. Ct. 319, C.D. 3375, 283 F. Supp. 89 (1968).

In C.D. 3896, cited by the plaintiffs, the merchandise was place mats woven of a cellophane-like material and red yarn which was classified under paragraph 1529 of the 1930 Tariff Act as modified by T.D. 54108 and claimed to be classifiable under paragraph 31(b) of that act as modified by T.D. 52739 and T.D. 54108 as articles in chief value of cellophane. In rejecting the claimed classification the court, after stating the general rule for ascertaining component material of chief value and exceptions to the rule and citing cases supporting the rule and exceptions, stated:

> In the instant case there is not a scintilla of evidence as to the value of the materials at the time they were ready for assembling into the complete article. There is no testimony establishing which

> component material is of chief value. An examination of the sample does not disclose it. The sample is made of yarn and cellophane material in substantial amounts. . . .

In C.D. 2536, cited by the plaintiffs, merchandise consisting of spinning wheel planters composed of wood and bamboo parts was classified under paragraph 409 of the 1930 Tariff Act as modified by T.D.'s 53865 and 53877 as articles not specially provided for, partly manufactured of bamboo, and claimed by the importer to be properly classifiable under paragraph 412 of that act as modified by T.D.'s 52373 and 52476 as manufactures of which wood is the component material of chief value, not specially provided for. The court, noting the absence of testimony establishing wood as the component material of chief value, nevertheless concluded that wood was the component material of chief value upon the court's own inspection of a sample of the merchandise, and went on to sustain the importer's claim through application of the *de minimus* rule to the minute bamboo portion of the article.

In C.D. 2607, cited by the plaintiffs, imported whisky cup candles composed of ceramic earthenware, paraffin wax, a wick, and paint were held to be articles in chief value of earthenware as claimed under paragraph 211 of the 1930 Tariff Act as modified by T.D.'s 51802, 53857, and 53877 based in part upon the court's examination of a sample of the merchandise and its consequent rejection of the wax, wick, and paint as components in chief value.

In C.D. 3974, cited by the defendant, the merchandise consisted of painted figures in the form of replicas of a choir boy and a girl composed of celluloid, cardboard, and laced material, and celluloid, cardboard, and twined cord, which was classified as dolls under TSUS item 737.20. The court rejected the importer's claim for classification of the articles under TSUS item 256.75 as articles of papier-mache after the court's examination of the articles failed to disclose the component material of chief value, the plaintiff having offered no evidence that papier-mache was the component material of chief value. The court said:

> . . . Manifestly, examination of the samples does not make it plainly evident that papier-mache is the component material of chief value. . . .

In C.D. 3375, cited by the defendant, merchandise consisting of a fabric-coated rubber mat, rectangular in shape, in which metal brushes were set was classified as brushes, without handles, other, under TSUS item 750.70, and claimed, among other things, to be classifiable under TSUS item 386.50 as articles of cotton. The case was submitted upon a sample exhibit and a stipulation to the effect that after importation

handles are attached to the articles and they are used in grooming pets, primarily dogs. The court held that the plaintiff had failed to establish that the importations were articles of cotton, the court rejecting statements appearing on the commercial invoice and special customs invoice prepared by the shipper to the effect that the articles were manufactures of cotton not specially provided for. The court said:

> . . . The burden is on plaintiff to prove the component of chief value of an article; it is not a matter for speculation by the court. . . .

From a study of the foregoing cases which have been called to the court's attention, among others, by counsel, it is clear that each case presenting the issue of component material of chief value must be decided upon the basis of its own developed facts. In the instant case there is no evidence before the court of the *costs* of the component materials *to the manufacturer* at the time they were ready to be assembled into the imported fasteners. The witness Jones is not connected with the manufacturer, and his testimony relating to the cost of plating was directed to his firm's plating costs and not to the manufacturer's plating costs. Moreover, the court's own inspection of the plated fasteners (panel nuts) depicted in exhibits 1A and 1B of the incorporated case record and of the unplated fasteners (panel nuts) depicted in collective exhibit 1 in the instant record fails to shed any light on the relative costs of the component materials involved.

The *de minimis* rule does not appear to be applicable to instant facts. The tariff schedules definitions [of words used between the description of an article and a material] indicate that the *de minimus* rule is intended to apply where the *interim* words employed in the tariff provisions are "wholly of", "in part of", or "containing", and do not apply where component material of chief value must be proven. See paragraph (f), No. 9—Definitions, General Headnotes and Rules of Interpretation, TSUS. And no such *interim* words appear in the inferior heading governing item 646.56 relied upon here by the plaintiffs.

Although the plating metal may be present in the disputed articles in small quantties, it cannot be determined from this record whether or not it has a greater value than the stock metal of which the body of the articles is composed. *Cf. Hirsch & Co. et al.* v. *United States*, 4 Ct. Cust. Appls. 82, 83, T.D. 33365 (1913), involving strip steel nickel plated wherein the plating was shown to be more valuable than the underlying body metal of the imported article. For the court to attempt to ascertain the relative values of the components in question in this case, on the basis of the evidence adduced on the record, would

lead into prohibited speculation. As such, the court agrees with the defendant when it says in its brief (p. 32): "Even assuming, *arguendo*, that it had been definitively shown that the rate of disproportion in the *amount* of cadmium as compared to the *amount* of steel is 'enormous,' this evidence in no way establishes the component of chief *value*. The correlation is *prima facie* defective."

It follows that inasmuch as the plaintiffs have failed to establish the component material of chief value in this case, it becomes unnecessary for the court to consider any other aspect of the case. These actions must be dismissed for failure of proof.

Judgment will be entered herein accordingly.

Decisions of the United States Customs Court

Abstracts

Abstracted Protest Decisions

Department of the Treasury, *June 24, 1974.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the Customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

VERNON D. ACREE,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P74/419	Boe, C. J. June 18, 1974	General Instrument Corporation	71-10-01340	Item 687.60 12.5%, 11% or 10% without allowance under item 807.00	Items 687.60/807.00 12.5%, 11% or 10% upon full value of imported merchandise (G-100 diodes) less cost or value of U.S. components (whiskers and solder preform in all entries; tin anode in entry 604954; solder wafer in entries 604954, 1523:8; cells in every entry except 6; and sleeve assembly in every entry except entry 501087)	Judgment on the pleadings General Instrument Corporation v. U.S. (C.A.D.'s 1062, 1106; C.D.'s 4408, 4422, 4470)	New York American goods returned (components of G-100 diodes)

P74/420	Boe, C. J. June 18, 1974	General Instrument Corporation	71-10-01345	Item 687.60 12.5% or 11% without allowance under item 807.00	Items 687.60/807.00 12.5% or 11% upon full value of imported merchandise (transistors NPN and PNP) less cost or value of U.S. components (gold preform and gold wire)	Judgment on the pleadings General Instrument Corporation v. U.S. (C.A.D.'s 1062, 1106; C.D.'s 4406, 4422, 4470)	New York American goods returned (components of transistors NPN and PNP)
P74/421	Ford, J. June 18, 1974	Laconia Needle Mfg. Co.	69/22647, etc.	Item 670.58 80¢ per 1000 plus 24%	Item 609.88 8%	Pistorino & Company, Inc. v. U.S. (C.D. 4373)	Boston Metal stampings
P74/422	Richardson, J. June 18, 1974	New York Merchandise Co., Inc.	65/6174	Item 927.53 3¢ ea. plus 67.5%	Item 650.21 1¢ ea. plus 17.5%	Judgment on the pleadings U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	San Diego Desser' knives
P74/423	Richardson, J. June 18, 1974	New York Merchandise Co., Inc.	66/3388	Item 927.53 3¢ ea. plus 6.5%	Item 650.21 1¢ ea. plus 17.5%	Judgment on the pleadings U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	San Diego Dessert knives
P74/424	Richardson, J. June 18, 1974	New York Merchandise Co., Inc.	66/3390	Item 927.53 3¢ ea. plus 67.5%	Item 650.21 1¢ ea. plus 17.5%	Judgment on the pleadings U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	San Diego Steak knives
P74/425	Richardson, J. June 18, 1974	New York Merchandise Co., Inc.	66/3406	Item 927.53 3¢ ea. plus 67.5%	Item 650.21 1¢ ea. plus 17.5%	Judgment on the pleadings U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	San Diego Dessert knives
P74/426	Richardson, J. June 18, 1974	New York Merchandise Co., Inc.	66/3417	Item 927.53 3¢ ea. plus 67.5%	Item 650.21 1¢ ea. plus 17.5%	Judgment on the pleadings U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	San Diego Dessert knives

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P74/427	Richardson, J. June 18, 1974	United Silver and Cutlery Co.	67/3185	Item 650.15 2¢ ea. plus 12.5%	Item 650.21 1¢ ea. plus 17.5%	Judgment on the pleadings U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	Los Angeles 2 pcs. carving set with inlaid plastic handle No. 370
P74/428	Richardson, J. June 18, 1974	Western Pacific Import Co.	67/8093	Items 650.15 and 650.45 2¢ ea. plus 12.5%	Item 650.21 1¢ ea. p'us 17.5% (butter knives) Item 650.49 1¢ ea. plus 17.5% (dessert and salad forks)	Judgment on the pleadings U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	Los Angeles Butter knives, dessert forks, salad forks
P74/429	Richardson, J. June 18, 1974	Western Pacific Import Co.	67/8117	Item 927.53 3¢ ea. plus 67.5% (knives) Item 650.45 2¢ ea. plus 12.5% (forks)	Item 650.21 1¢ ea. plus 17.5% (knives) Item 650.49 1¢ ea. plus 17.5% (forks)	Judgment on the pleadings U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	Los Angeles Knives and forks
P74/430	Richardson, J. June 18, 1974	Western Pacific Import Co.	67/24941	Items 650.15 and 650.45 2¢ ea. plus 12.5%	Item 650.21 1¢ ea. plus 17.5% (knives) Item 650.49 1¢ ea. plus 17.5% (forks)	Judgment on the pleadings U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	Los Angeles Knives and forks

P74/431	Richardson, J. June 18, 1974	Western Pacific Import Co.	67/24860	Items 650.15 and 650.45 2¢ ea. plus 12.5%	Item 650.21 1¢ ea. plus 17.5% (knives) Item 650.49 1¢ ea. plus 17.5% (forks)	Judgment on the pleadings U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	Los Angeles Knives and forks
P74/432	Richardson, J. June 18, 1974	Western Pac fic Import Co.	67/31628	Item 6o0.45 2¢ ea. plus 12.5%	Item 650.49 1¢ ea. plus 17.5%	Judgment on the pleadings U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	Los Angeles Forks
P74/433	Richardson, J. June 18, 1974	Western Pacific Import Co.	67/52676	Items 650.15 and 650.45 2¢ ea. plus 12.5%	Item 650.21 1¢ ea. plus 17.5% (knives) Item 650.49 1¢ ea. plus 17.5% (forks)	Judgment on the pleadings U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	Los Angeles Knives and forks
P74/434	Richardson, J. June 18, 1974	James G. Wiley Co., a/c E. J. & R Gindi	67/13163	Item 651.75 66.3%, 24.06%, 24.55% or 73% (ad valorem equivalent rates)	Item 651.75 1¢ ea. plus 17.5%; 2¢ ea. plus 12.5%	Judgment on the pleadings Import Associates of America et al. v. U.S. (C.A.D. 961)	Los Angeles 3 Roses Pattern, Wheat Pattern, 3 pc. and 5 pc. Barbecue Sets, Pattern Nos. 170 and 171
P74/435	Watson, J. June 18, 1974	Creative Art Flowers	71-5-00093	Item 748.20 23.5%	Item 774.60 11.5%	Joseph Markovits, Inc. v. U.S. (C.D. 4396)	New York Artificial flowers, etc.
P74/436	Watson, J. June 18, 1974	Creative Art Flowers, Inc.	71-11-01807	Item 748.20 22% or 23.5%	Item 774.60 10% or 11.5%	Joseph Markovits, Inc. v. U.S. (C.D. 4396)	New York Artificial ferns, in c.v. of plastic, produced in one piece

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P74/437	Watson, J. June 18, 1974	Crown Florist Supply et al.	67/76082(A), etc.	Item 748.20 28%, 26.5% or 25%	Item 774.60 17%, 15% or 13.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) Joseph Markovits, Inc. v. U.S. (C.D. 4396) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185)	Los Angeles Plastic artificial flowers, etc. (items marked "A" and "B")
P74/438	Watson, J. June 18, 1974	Ribbon Narrow World Wide, Inc.	72-9-02026	Item 748.20 26.5%	Item 774.60 10%	Joseph Markovits, Inc. v. U.S. (C.D. 4396)	New York Artificial ferns, fruit, leaves
P74/439	Newman, J. June 18, 1974	S. Hiller & Co.	66/80535	Item 653.40 19% (as entireties)	Protest premature; appraisement and liquidation not according to law; protest dismissed; regional commissioner ordered to take appropriate action	Mobilite, Inc. v. U.S. (C.R.D. 73-11)	New York Fluorescent lamps with bulbs (not entireties)
P74/440	Re, J. June 18, 1974	A & P Import Co.	72/8	Item 772.15 15%	Item 772.35 11%	Venetianaire Corp. of America v. U.S. (C.A.D. 1084)	New York Plastic mattress covers

P74/441	Ford, J. June 19, 1974	W. T. Grant Co. et al.	67/15670, etc.	Item 684.70 15%	Item 685.22 12.5%	General Electric Company v. U.S. (C.D. 3887 aff'd C.A.D. 1021)	New York Earphones
P74/442	Ford, J. June 19, 1974	J. C. Penney Purchasing Corp. et al.	69/30575, etc.	Item 684.70 13%	Item 685.25 11%	General Electric Company v. U.S. (C.D. 3887 aff'd C.A.D. 1021)	San Francisco Earphones (items marked "A" and "B")
P74/443	Ford, J. June 19, 1974	Sony Corp. of America	71-6-00367	Item 684.70 15% or 13%	Item 685.25 11% or 12.5%	General Electric Company v. U.S. (C.D. 3887 aff'd C.A.D. 1021)	New York Earphones
P74/444	Ford, J. June 19, 1974	Universal Transcontinental Corp.	66/34986, etc.	Item 684.70 15%	Item 685.22 12.5%	General Electric Company v. U.S. (C.D. 3887 aff'd C.A.D. 1021)	New York Earphones
P74/445	Landis, J. June 19, 1974	Columbia Motor Corp. et al.	69/15462, etc.	Item 653.40 or 653.39 19%	Item 683.65 8.5%, 7.5% or 6.5%	Warshawsky & Company v. U.S. (C.D. 4410)	New York Lights
P74/446	Landis, J. June 19, 1974	New York Merchandise Co., Inc.	67/43037	Item 546.51 50%	Plaintiff entitled to refund of excess customs duties in sum of $119.56 occasioned by reliquidation (under item 546.35 at 25.5%) of entry 21-310 on 10/25/66; district director ordered to complete reliquidation of entry	Agreed statement of facts	Los Angeles Bubble glass brandy snifters

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P74/447	Watson, J. June 19, 1974	Swank, Inc.	73-11-03004	Duty assessed on entire quantity of merchandise on entry, although 4 cartons of cigarette lighters were reported manifested but not found	District director ordered to reliquidate entry making allowance for duty assessed on cartons No. 159, 162, 163, 171	Agreed statement of facts	Boston Shortage, cigarette lighters
P74/448	Re, J. June 19, 1974	Franshaw, Inc.	69/45280	Item 772.15 15%	Item 772.35 11%	Venetianaire Corp of America v. U.S. (C.A.D. 1084)	New York Plastic mattress covers
P74/449	Re, J. June 19, 1974	Rice Bayersdorfer Co.	67/74864, etc.	Item 737.20 35% (items marked "A" and "B")	Item 772.95 25.5% (items marked "A") Item 772.97 17% (items "B")	Agreed statement of facts (items marked "A" and "B")	Philadelphia Christmas tree ornaments of plastics (items marked "A") Christmas ornaments of plastics, not Christmas tree ornaments (items marked "B")

P74/450	Re, J. June 19, 1974	United Silver & Cutlery Co.	67/76153	Item 772.06 17% plus $0.21	Item 772.15 17%	Davar Products, Inc. v. U.S. (C.D. 3880)	Los Angeles Plastic covered candy bowls
P74/451	Landis, J. June 21, 1974	Chieftain Uniworld Corp.	71-8-00680, etc.	Item 653.32 19%	Item 683.65 6.5%, 5.5% or 5%	Warshawsky & Company v. U.S. (C.D. 4410)	New York Driving lights and fog lights
P74/452	Watson, J. June 21, 1974	George S. Bush & Co., Inc.	67/18193	Item 652.35 or 657.20 19% or 17%	Item 652.18 12.5%	Judgment on the pleadings Kelco Incorporated et al. v. U.S. (C.D. 3931)	Portland, Oreg. Conveyer chain chiefly used for transmission of power
P74/453	Watson, J. June 21, 1974	George S. Bush & Co., Inc.	67/18194	Item 652.35 or 657.20 19% or 17%	Item 652.18 12.5%	Judgment on the pleadings Kelco Incorporated et al. v. U.S. (C.D. 3931)	Portland, Oreg. Conveyor chain chiefly used for the transmission of power
P74/454	Watson, J. June 21, 1974	George S. Bush & Co., Inc.	67/18195	Item 652.35 or 657.20 19% or 17%	Item 652.18 12.5%	Judgment on the pleadings Kelco Incorporated et al. v. U.S. (C.D. 3931)	Portland, Oreg. Conveyor chain chiefly used for transmission of power
P74/455	Watson, J. June 21, 1974	George S. Bush & Co., Inc.	67/18196	Item 652.35 or 657.20 19% or 17%	Item 652.18 12.5%	Judgment on the pleadings Kelco Incorporated et al. v. U.S. (C.D. 3931)	Portland, Oreg. Conveyor chain chiefly used for transmission of power

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Abstracts

Abstracted Reappraisement Decision

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R74/265	Maletz, J. June 18, 1974	Majestic Electronics Corp.	R65/10990	Export value: Invoiced and entered value	Not stated	Majestic Electronics, Inc. v. U.S. (R.D. 11686)	Los Angeles Miscellaneous products (wigs, wiglets, ponytails, etc.)

**Judgment of the United States Customs Court
In Appealed Case**

JUNE 20, 1974

APPEAL 5533.—Green Giant Co. *v.* United States.—
BLANCHED FROZEN MUSHROOMS—MUSHROOMS: FRESH; OTHERWISE PREPARED OR PRESERVED—TSUS. C.D. 4401 REVERSED APRIL 25, 1974. C.A.D. 1117

ERRATUM

In Vol. 8, No. 23, weekly Customs Bulletin, June 5, 1974 issue, page 30 (C.D. 4539), last paragraph of decision, should read:

ORDERED, ADJUDGED and DECREED that defendant's motion to dismiss this action is granted and the action is hereby dismissed.

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